

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE STEPHEN V. WILSON, U.S. DISTRICT JUDGE PRESIDING

NML CAPITAL LIMITED, ET AL.,)	
)	
Plaintiff,)	
)	
vs.)	No. CV 14-2262-SVW
)	
)	
SPACE EXPLORATION TECHNOLOGIES,)	
CORP., ET AL.,)	
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, JUNE 30, 2014

DEBORAH K. GACKLE, CSR, RPR
United States Courthouse
312 North Spring Street, Room 402A
Los Angeles, California 90012
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U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
COURT REPORTER DEBORAH K. GACKLE

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1 **LOS ANGELES, CALIFORNIA; MONDAY, JUNE 30, 2014; 1:35 P.M.**

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4 THE CLERK: Item 4, CV 14-2262-SVW, NML Capital,
5 Limited v. Space Exploration Technologies Corp., et al.

6 Counsel, please state your appearances.

7 MR. BARZA: Good afternoon, Your Honor. Harold Barza
8 of Quinn Emanuel for NML.

9 MR. ENGEL: Good afternoon, Your Honor. Steve Engel,
10 Dechert LLP for plaintiff NML, as well.

11 MR. SHELTON: Good afternoon, Your Honor. Ian
12 Shelton for plaintiff NML Capital from Quinn Emanuel.

13 MR. HOSEN: Good afternoon, Your Honor. Matthew
14 Hosen from Quinn Emanuel for NML capital, plaintiff.

15 MR. DONOVAN: Good afternoon, Your Honor. Bill
16 Donovan on behalf of SpaceX.

17 MR. BROWN: Good afternoon, Your Honor. Donald Brown
18 of Manatt Phelps and Phillips on behalf of the defendant, the
19 Republic of Argentina.

20 MR. SLATER: Good afternoon. Matt Slater, Cleary
21 Gottlieb, on behalf the Republic of Argentina. Here with my
22 colleague Mike Brennan.

23 MR. GUMER: Good afternoon, Your Honor. Carl Grumer
24 for the Republic of Argentina.

25 THE COURT: I first want to ask some questions of the

1 Republic of Argentina.

2 Who speaks for --

3 MR. SLATER: Your Honor, Matthew Slater. I'll be
4 speaking on behalf of the republic.

5 THE COURT: Yes. Now, the contract with SpaceX, I
6 want to get a better understanding of exactly what's involved.

7 My understanding is that it was a contract to reserve
8 a spot with SpaceX to launch a satellite for Argentina; is that
9 correct?

10 MR. SLATER: Your Honor, let me preface this by
11 saying I have not seen the contract, but my understanding is
12 slightly different --

13 THE COURT: How is it that you haven't seen the
14 contract?

15 MR. SLATER: I'm saying I personally have not.

16 THE COURT: Who has seen it?

17 MR. SLATER: Other counsel have --

18 THE COURT: I want to speak to the -- would you take
19 the lectern and identify yourself.

20 MR. DONOVAN: Your Honor, Bill Donovan for SpaceX.

21 THE COURT: Okay. Yes. Can you tell me -- and, of
22 course, this is subject to my examination, but at least I want
23 to get your interpretation -- is that agreement between SpaceX
24 and Argentina an agreement where, for a fee from Argentina to
25 SpaceX, SpaceX reserved a use of its rocket for launching a

1 satellite for Argentina?

2 MR. DONOVAN: That's correct.

3 THE COURT: And when the rocket actually is launched
4 for the satellite, is there an additional fee? In other words,
5 the fee that Argentina paid, was that just to reserve the right
6 to launch the rocket, or was it a fee that encompassed, sort
7 of -- what's the term? -- I can't think of the term, but was it
8 to allow Argentina to actually use the rocket?

9 MR. DONOVAN: Correct, Your Honor. My understanding
10 is the intent was to actually pay a fee, not just to reserve
11 the right but actually launch the satellites.

12 THE COURT: Is that in the contract? Was there any
13 mechanism whereby the Republic of Argentina could change its
14 mind, withdraw?

15 MR. DONOVAN: I believe the answer is no, Your Honor.

16 THE COURT: Do you know that for a --

17 MR. DONOVAN: I don't have the contract in front of
18 me; some of the lawyers for the Republic may.

19 THE COURT: Yes, but your sense of it is that it was
20 a binding agreement.

21 MR. DONOVAN: Absolutely.

22 THE COURT: I see. And no further monies were due
23 and payable at a later time.

24 MR. DONOVAN: There may be additional monies that are
25 due and payable under the contract, but the contract is

1 explicit that the rights are given just to Argentina and no
2 other entity, and it's not assignable.

3 THE COURT: I see. Stay there for a second. Thank
4 you.

5 Let me turn back to the Republic of Argentina.

6 MR. SLATER: Yes, Your Honor.

7 THE COURT: Was Argentina to use the satellite
8 strictly for governmental purposes? In other words, for
9 accumulating data, weather information, whatever, for the
10 benefit of the Republic of Argentina and its citizens, or was
11 there a private purpose?

12 MR. SLATER: No, this was -- again, as in the case
13 with the Spaceport case, a cooperative venture with other
14 foreign governments for governmental purposes.

15 THE COURT: I see. Okay. Thank you.

16 Let me turn now to NML. Some of the issues are
17 already decided, so we need not review them.

18 The two issues that are of concern are the
19 applicability of the so-called core test and whether there are
20 disputed facts involved in that test and what the disputed
21 facts may be. And the other question, of course, is "used for
22 commercial purposes," and the question that the court has is,
23 first, if the satellite itself was to be used for governmental
24 purposes, how could it possibly meet the test of being used for
25 commercial purposes in the United States? Now, of course I am

1 aware of the reference in the Supreme Court case to the Army
2 contract for boots and so forth, but looking at the statute
3 itself, the question I have, in part, is can the statute be
4 read to require a commercial purpose -- a commercial use, and
5 is the term "purpose" in the statute included so as to limit
6 the ability of a party to label something a commercial use when
7 it isn't a commercial use or vice versa? And then, of course,
8 the second part is -- the cases say it has to be used for
9 commercial purposes in the United States, and the agreement is
10 for a use in the future, arguably. That is the launching of
11 the satellites in 2015 and 2016.

12 So how could that background meet the test of having
13 been used for commercial purpose in the United States? Of
14 course, I realize you don't have to -- wouldn't have to reach
15 the commercial purpose test if the court found that the -- that
16 core test wasn't met. But let's pass on the core test for the
17 minute and go to the commercial purpose test.

18 MR. BARZA: Yes, Your Honor. Thank you.

19 I think there are two threads that you were raising
20 for me to address, and the first one is a temporal point: Do
21 they have to be using it now as opposed to in the future, and I
22 would submit that they are using it right now. They're holding
23 active executory contract rights to do a launch in 2015, but
24 that gives them certain rights right now that they are
25 exercising. One of those is a restriction on SpaceX's ability

1 to offer that launch site to someone else. Also, we understand
2 there are ongoing interactions between SpaceX and Argentina,
3 and I think discovery would show that.

4 THE COURT: What would it show it?

5 MR. BARZA: I believe there are ongoing activities
6 between them related to the launch: The exchange of
7 information, talking about launch sites, weights, things like
8 that, and I think that's an ongoing use of those contractual
9 rights, and discovery, I think, would show that. Further, I
10 think holding those rights now maintaining that slot is an
11 active use.

12 In addition, there are cases indicating that you
13 don't have to be using the asset every minute to qualify for
14 commercial use. There's a case we cite from the Second Circuit
15 by Judge Cabranes. It's the NML case, I think from 2012. That
16 involved an attachment of an account that was held by an
17 Argentinian subdivision that was using it to buy scientific
18 equipment in the states for shipment to people overseas, and
19 Judge Griesa in the district court held that that was a
20 commercial use because they were using the funds in the account
21 to buy things, and the Second Circuit affirmed that, and it's
22 one of the cases cited.

23 THE COURT: What about the -- at least facial
24 disconnect between the use of the satellite for governmental
25 purposes and the notion that that still could be used for

1 commercial purpose?

2 Can you explain that --

3 MR. BARZA: Yes, I would like to. Thank you.

4 The point of the test is you look at whether the
5 activity is commercial. The statute doesn't say use for a
6 commercial activity -- I'm sorry -- for a commercial purpose,
7 it says "use for a commercial activity," and if you look at the
8 statute itself, 28 U.S.C. 1603, it defines "commercial
9 activity," and what it says is "Commercial activity means
10 either a regular course of commercial conduct or a particular
11 commercial transaction or act. The commercial character of an
12 activity shall be determined by reference to the nature of the
13 course of conduct or particular transaction or act rather than
14 by reference to its purpose."

15 Now, when --

16 THE COURT: That's the phrase that seems less clear
17 to me. Can you --

18 MR. BARZA: Yes, in two ways: First of all, in that
19 same opinion in the Second Circuit, there was an issue about
20 whether the funds that were being used by this subdivision of
21 the Argentinian government to buy scientific equipment was
22 commercial activity, and the argument from Argentina was it's
23 not commercial activity because they're buying the scientific
24 equipment to do government experiments and advance government
25 purposes. The Second Circuit said that doesn't matter. What

1 matters is whether or not they're buying things that other
2 people buy in a commercial transaction. That's using it for --

3 THE COURT: It's like the Army boot case.

4 MR. BARZA: That's similar to the Army boot case,
5 Your Honor.

6 In addition, I have a copy -- if I could approach --
7 of the legislative history which is cited in the briefs, in
8 which the house report states at page -- I'll just read it --

9 THE COURT: What is the cite to the --

10 MR. BARZA: This is House Report -- I'm sorry. I
11 don't have my glasses -- Foreign Sovereign Immunities Act of
12 1976, House Report No. 94-1487, September 9th, 1976, to
13 accompany House Report 11315 and then Senate report (Judiciary
14 Committee) No. 94-1310, September 27th, 1976.

15 THE COURT: Why don't you, perhaps, summarize or read
16 what you think is pertinent.

17 MR. BARZA: What's pertinent is when they talk about
18 the commercial activity definition, they say, "... a contract
19 by a foreign government to buy provisions" --

20 THE COURT: Slower.

21 MR. BARZA: Sorry. I apologize.

22 THE COURT: Start again.

23 MR. BARZA: Thank you.

24 "Thus, a contract by a foreign government to buy
25 provisions or equipment for its Armed Forces or to construct

1 government building constitutes a commercial activity. The
2 same would be true of a contract to make repairs on an embassy
3 building. Such contract should be considered to be commercial
4 contracts even if their ultimate objective is to further a
5 public function."

6 Now, making repairs on an embassy is like launching a
7 satellite. You can say the embassy is performing a
8 governmental function, et cetera, but the repairs on it are
9 commercial. Similarly, regardless of what they're using the
10 satellite for, the launch services are a separate commercial
11 right, and that is commercial activity.

12 THE COURT: Thank you.

13 Let me hear from the Republic of Argentina.

14 MR. SLATER: I think that what you've just heard
15 typifies the fallacy of the argument that's been made on the
16 other side, and it reads out of the statute the words "used for
17 a commercial purpose." The example that Your Honor mentioned
18 that was just referenced by Mr. Barza -- Barza?

19 MR. BARZA: Barza.

20 MR. SLATER: Barza. I'm sorry, sir.

21 MR. BARZA: No problem.

22 MR. SLATER: -- concerning a contract for provisions
23 of the Army is dealing with the question of whether there is a
24 commercial activity which itself would affect a waiver of
25 immunity based upon which the sovereign could be sued as to

1 that activity. It says nothing as to the use of the proceeds
2 or the ultimate product of that contract and whether that
3 product could itself be subject to execution.

4 The execution remedy turns on a different section,
5 section 1610(a), which speaks to not just a commercial activity
6 or something that arose from a commercial activity, but whether
7 it is property used in the United States for a commercial
8 activity.

9 And so to take the government contract case, if the
10 military contracted to buy bullets --

11 THE COURT: Which military?

12 MR. SLATER: A foreign sovereign contracted to buy
13 bullets in the United States, and there was a dispute with the
14 company from which it was buying those bullets, that would be
15 deemed a commercial activity upon which the sovereign could be
16 sued in the United States court. It says nothing as to whether
17 in some other unrelated context somebody else could come along
18 and try to execute on those bullets if they're simply
19 maintained in the United States, or indeed if they're to be
20 shipped to the sovereign's military for use in a war, at which
21 point it's clearly property to be used for a noncommercial
22 purpose.

23 And so -- I don't want to belabor what I think the
24 court has made clear as already familiar, but it is helpful to
25 recap the prior litigation between these parties concerning the

1 satellites themselves, where this court, albeit through Judge
2 Otero, quite helpfully synthesized the decisions of the various
3 circuits, including especially the Ninth Circuit in Af-Cap,
4 with respect to the meaning of that term "used for a commercial
5 activity."

6 THE COURT: Wasn't Judge Otero dealing with a
7 different right? I mean, he wasn't dealing with this issue.

8 MR. SLATER: He was dealing with the satellites
9 themselves --

10 THE COURT: Right.

11 MR. SLATER: -- and now they're trying to do, in
12 effect, an end run around that by saying somehow the contract
13 is distinguishable. And if I may, I'd like to run through the
14 key elements of the test as articulated in that case.

15 First, again focusing on the term "used for," the
16 circuit court explained that "used for" doesn't mean simply
17 possession, it means putting into action, putting into service,
18 availing for or employed for a commercial activity.

19 THE COURT: So in this case, if the satellite had
20 been launched -- well, I guess once it's launched, it wouldn't
21 be susceptible to execution because it was already launched.

22 MR. SLATER: Correct.

23 THE COURT: So what if one of the satellites had been
24 launched and the other hadn't, would that change the analysis?

25 MR. SLATER: No, Your Honor, because, first of all,

1 there's a question of whether there's any property being used
2 at all in the United States. And in its complaint, what NML
3 alleged was that private parties may contract for launch
4 services, and therefore CONAE's purchase of private launch
5 services is a commercial activity. Now, that is contradicted,
6 again, by the prior decision where the court, again, following
7 the Af-Cap decision in the Ninth Circuit, said it's not
8 sufficient simply to be in possession of the property, it must
9 be property that's being used for a commercial purpose; it must
10 be active employment for that purpose at the time that the writ
11 is sought; and third, how the property was generated is totally
12 irrelevant. So the fact that a private party might contract
13 for launch services tells you nothing about what use is being
14 made by the Republic of Argentina or C.O.N.A.E., as the case
15 is, in this instance.

16 So regardless of whether that contract is the product
17 of a commercial activity, that activity is at an end, and the
18 contract now exists. It's not being used for the purpose of
19 entering into a contract, it is a contract. And just as in the
20 prior case, it was irrelevant whether the satellites were
21 assembled -- and the assembly of a satellite might be deemed to
22 be a commercial activity, that activity was at an end, and the
23 question was for what use was it to be put.

24 Now, again, Judge Otero said no use is being made
25 now, and that's the case with this contract, too. If their

1 argument were correct, then any piece of property which
2 necessarily includes rights of exclusion would be used by the
3 holder, would be a current use, and there never would be
4 immunity under the execution clause of 1610 (a), and that
5 simply is not how anybody has ever read this statute before.

6 So the first point is that the contract is not being
7 used for any purpose, but then if you think, well, you have to
8 look down the road and in what way might the contract be put
9 into action, it would be put into action in service of the
10 launch of satelllites which are specific and which are for
11 governmental purposes.

12 And going back again to the language of 1603, the
13 definitional language that was recited previously, the court
14 has instructed to look at the nature not just of a single
15 activity, but to a course of activity, because that's what is
16 at issue here. Now we're looking to a course of activity.
17 What is the activity in which this will be used, availed of,
18 over a course of time? If it's relevant to look to the future
19 at all, you have to look to that future activity of the
20 satelllites themselves, which will be outside of the United
21 States but, in any event, would not be used for a commercial
22 purpose.

23 I think that's --

24 THE COURT: Thank you. Let me give the plaintiffs an
25 opportunity to respond, if they wish.

1 MR. BARZA: Thank you, Your Honor.

2 Your Honor, the property at issue here is not the
3 satellite, it's commercial contract rights. They're being used
4 right now to maintain the spot, and that property can only be
5 used for one function. Unlike a -- cash, which is generic and
6 could conceivably used for 100 different reasons, this right
7 only has one use it can be put to, and that's to maintain the
8 launch site and launch the satellite. They said it can't even
9 be canceled. So I think the property really only has a
10 commercial use here.

11 THE COURT: Let me ask you -- I'm switching gears
12 because I think I've heard the arguments.

13 On the question of the core function, the defendants
14 maintain that the -- well, I guess it's the plaintiff that
15 maintains that the agency, C.O.N.A.E. -- do I say that
16 correctly? I guess that's the acronym -- C-O-N-A-E. I call it
17 "C.O.N.A.E."

18 Is that the way you pronounce it, C.O.N.A.E.?

19 MR. BARZA: We called it the National Commission, but
20 I do think they pronounce it that way.

21 MR. DONOVAN: C.O.N.A.E., Your Honor.

22 THE COURT: C.O.N.A.E. -- is whether C.O.N.A.E., even
23 if it is a public entity, as that term is understood, is
24 C.O.N.A.E. sort of self-funding, self-managing, and that's part
25 of the case law test -- and the Ninth Circuit has adopted that.

1 So what disputed facts exist on that question?

2 MR. BARZA: Your Honor, we believe the facts as
3 alleged are sufficient, but the disputed facts would go to how
4 C.O.N.A.E., or the National Commission, is funded; whether
5 they're actually generating any meaningful revenues at all. We
6 don't believe they are. We think the bulk, if not all, of
7 their revenues from the government budget; we think their
8 budgets are approved through the government, so their
9 self-sufficiency would be something to be explored for sure.
10 Their independence from the government might be a factor to be
11 looked at, but I must admit that we believe that under the core
12 function test, we've already passed that bar, if you would,
13 because their purposes are governmental. As we read the *Cubic*
14 decision in particular, that is the start and end of the
15 analysis for the core function test. The *Cubic* case says even
16 if they weren't financially dependent on the government, it
17 wouldn't matter. You should look at footnote ten there, too,
18 but I think *Cubic* makes it clear.

19 THE COURT: Let me ask the same question of the
20 Republic of Argentina.

21 MR. SLATER: Your Honor, the Supreme Court in the
22 *Bancheck* case in footnote 27 specifically said that whether you
23 can disregard the separate assistance of a governmental entity
24 may not turn on whether it's serving a governmental purpose.
25 So must be something more and different than that.

1 In this case, from the governmental decree that
2 created C.O.N.A.E. many, many, many years ago, it's clear on
3 the face of it -- and this is incorporated into their
4 complaint -- that C.O.N.A.E. is a juridical entity; it can sue
5 and be sued in its own name; it can contract in its own name;
6 it's governed by a board of directors and managed by a
7 professional CEO; it has a separate budget and must obtain
8 financing on its own and not solely from the government; and it
9 carries out space research and development policy which is
10 governmental in nature but certainly not a core function as has
11 been deemed by the other cases that dealt with that issue.

12 THE COURT: What if the plaintiff in discovery was
13 able to show that most of the financing for the agency,
14 C.O.N.A.E., came from the government and that its autonomy, in
15 terms of what it could research, how it could function, was
16 dictated by the government? Couldn't that change the mix?

17 MR. SLATER: Only if they could show that they could
18 pierce the veil in the way that *Bancheck* says that you may, and
19 those facts would not be sufficient to do so.

20 Your Honor, the core function test has been used to
21 try to identify circumstances when a nominally separate entity
22 is so inseparable from the sovereign itself that you can only
23 say that it is the sovereign itself. So the examples -- and
24 the only examples of which we're aware -- are the military, or
25 things like the Treasury, not independent agencies like the

1 space agency or a medical research entity or other sorts of
2 separate entities, which, again, have separate juridical
3 status. And, again, under 1603, it's not necessary that it be
4 corporate in form, it's sufficient that it be a separate
5 juridical entity. The fact that it has a separate board of
6 directors is quite important; the fact that it has a
7 professional executive who manages the entity is quite
8 important; and that's, again, undisputed plain on the face of
9 the decree itself that it can contract in its own name and, in
10 fact, in this case. The contracts that they're claiming to
11 have an interest in are contracts that were entered into by
12 C.O.N.A.E., not by the Republic of Argentina.

13 THE COURT: All right. I think I have enough to
14 think about, and I'm going to take the matter under submission
15 and issue an order. Thank you.

16 MR. SLATER: Thank, Your Honor.

17 MR. BARZA: Thank you.

18 (Proceedings concluded at 2:10 p.m.)

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C E R T I F I C A T E

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/s/ _____

Deborah K. Gackle
CSR No. 7106

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